AETNA UNIVERSAL INSURANCE SDN BHD

v.

OOI MENG SUA

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: P-02-579-1997]
16 MAY 2001

LABOUR LAW: *Employment - Dismissal - Misconduct - Employee inducing others to leave employer - Whether a serious misconduct to warrant summary dismissal - Common law principles governing master and servant relationship - Whether employer entitled to summarily dismiss employee notwithstanding contractual provision requiring two weeks' notice - Whether employer should hold a disciplinary inquiry before dismissing employee*

The appellant insurance company appealed against the decision of the learned trial judge who held that the dismissal of the respondent by the appellant was bad and awarded the respondent damages. The learned trial judge held that the appellant, who had summarily dismissed the respondent on a complaint of misconduct, was obliged to give the respondent two weeks' notice as stipulated in his contract of employment before the dismissal.

The respondent was alleged to have joined another insurance company and to have induced four other employees to leave the appellant. The issues were: (1) whether the respondent's misconduct warranted summary dismissal despite the two weeks' notice to be given before dismissal; and (2) whether the appellant ought to have held a proper disciplinary inquiry before the dismissal.

Held:
Per Gopal Sri Ram JCA

[1] At common law, a master is entitled to summarily dismiss his servant at any time notwithstanding any contractual provision requiring the giving of notice of termination.

[2] The learned trial judge had misdirected himself. He ought to have held that misconduct had been proved when he had accepted the evidence of the appellant's witnesses who testified that the respondent had attempted to induce them to leave the appellant. It was irrelevant that the respondent himself did not join another insurance company. Suffice that he made attempts to get other fellow employees to leave. The effect of such a

conduct would be to undermine the business of the employer. It is conduct that is seriously corrosive of the relationship of master and servant. It warranted the immediate termination of the contract of employment. To require a master in these circumstances to pay damages as the learned trial judge had ordered was to add insult to injury.

[3] At common law it is irrelevant that the master has not heard the servant in his defence before terminating his services. What is important is whether the proved or admitted facts disclose a breach of contract, for if they do, the master need not pay damages.

Per curiam:

[1] When the present dispute between the parties first arose, the present solicitors for the appellant had acted for the respondent. They now act for the appellant. That was plainly wrong even if there were no objections from the respondent's solicitors as they had been privy to confidential information given to them by the respondent when he was their client then. The fact that they did not use that information against him was irrelevant. There were other obvious dangers such as having access to information from the respondent and using it at the appellate stage. That was an abuse of a solicitor's position.

[Appeal allowed; order of learned trial judge set aside; respondent/plaintiff's suit dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu syarikat insurans merayu terhadap keputusan hakim perbicaraan yang bijaksana yang memutuskan bahawa pemecatan responden oleh perayu adalah tidak sempurna dan memberikan responden gantirugi. Hakim perbicaraan yang bijaksana memutuskan bahawa perayu, yang telah secara terus memecat responden atas aduan salah laku, berkewajipan untuk memberikan responden notis selama dua minggu sepertimana yang ditetapkan dalam kontrak pekerjaan responden sebelum pemecatan tersebut.

Responden didakwa telah menyertai sebuah syarikat insurans yang lain dan telah mendorong empat pekerja lain supaya meninggalkan perkhidmatan perayu. Isu-isu adalah: (1) samada salah laku responden mewajarkan pemecatan terus meskipun notis dua minggu tersebut haruslah diberikan sebelum pemecatan; dan (2) samada perayu sepatutnya mengadakan siasatan tatatertib yang sempurna sebelum pemecatan tersebut.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Menurut common law, seseorang majikan berhak memecatkan terus pekerjanya pada bila-bila masa meskipun terdapatnya peruntukan kontraktual yang memerlukan notis penamatan diberikan.

[2] Hakim perbicaraan yang bijaksana telah tersalah arah akan dirinya. Beliau sepatutnya memutuskan bahawa salah laku telah terbukti ketika beliau menerima keterangan saksi-saksi perayu yang telah memberi keterangan bahawa responden telah cuba untuk mendorong mereka supaya berhenti daripada perkhidmatan perayu. Ianya adalah tidak relevan bahawa responden sendiri tidak menyertai perkhidmatan sebuah syarikat insurans yang lain. Adalah memadai bahawa beliau telah membuat percubaan-percubaan untuk mempengaruhi pekerja-pekerja lain supaya berhenti. Kesan perlakuan yang sedemikian akan merosakkan perniagaan majikan tersebut. Ianya adalah perlakuan yang secara seriusnya menghakis perhubungan antara majikan dan pengkhidmatnya. Ianya mewajarkan penamatan segera kontrak pekerjaan. Untuk menghendaki majikan dalam keadaan ini membayar gantirugi sepertimana yang hakim perbicaraan yang bijaksana telah perintahkan menambahkan penghinaan kepada kemudaratan yang telah disebabkan.

[3] Menurut common law, ianya adalah tidak relevan bahawa majikan tidak mendengar pembelaan oleh pengkhidmat sebelum menamatkan perkhidmatannya. Apa yang penting adalah samada fakta-fakta yang terbukti atau diakui mendedahkan kemungkiran kontrak, kerana jika ianya memungkiri kontrak, majikan tidak perlu membayar gantirugi.

Per curiam:

[1] Ketika pertikaian semasa ini pertama kalinya berbangkit antara pihak-pihak tersebut, peguamcara semasa bagi pihak perayu telah bertindak bagi pihak responden. Mereka kini bertindak bagi pihak perayu. Itu adalah salah meskipun tiada bantahan daripada peguamcara responden kerana mereka privi kepada maklumat sulit yang diberikan kepada mereka oleh responden ketika ia klien mereka. Hakikat bahawa mereka tidak menggunakan maklumat tersebut terhadap responden tidak relevan. Terdapat bahaya lain yang ketara seperti mempunyai akses kepada maklumat daripada responden dan menggunakannya di peringkat rayuan. Itu adalah penyalahgunaan kedudukan peguamcara.

[Rayuan dibenarkan; perintah hakim perbicaraan yang bijaksana diketepikan; guaman responden/plaintif ditolak.]

Case(s) referred to:

Boston Deep Sea Fishing & Ice Co v. Ansell [1888] 39 Ch D 339 ***(refd)***
Francis v. Municipal Councillors of Kuala Lumpur [1962] MLJ 407 ***(refd)***
Menon v. Brooklands (Selangor) Rubber Co Ltd [1968] 1 MLJ 15 ***(foll)***
Motilal v. Guthrie Agency (M) Ltd [1968] 1 MLJ 211 ***(foll)***
Panchaud Freres SA v. Establisement General Grain Co [1970] 1 Lloyd's LR 53 ***(refd)***
Sinclair v. Neighbour [1966] 3 All ER 988 ***(foll)***
SR Fok v. Ek Liong Hin Ltd [1957] MLJ 1 ***(refd)***
Wickman Machine Tool Sales Ltd v. Schuler AG [1972] 1 WLR 840 ***(refd)***

For the appellant - Robert Lazar (G Rajasingam with him); M/s Shearn Delamore & Co
For the respondent - Surinder Singh; M/s Ong & Manecksha

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-163-1992]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This case has to do with an action for breach of contract. The facts are fairly straightforward and are easily told.

The defendant (who is the appellant before us) is an insurance company. The plaintiff (respondent in the appeal) was employed by the appellant as its agent under two contracts. One of these was an agency contract. The other was an agency manager's contract. The two contracts are to be read together. Indeed, a clause in one of them says as much. One of the contracts has a clause that entitles the appellant to terminate the relationship by giving 14 days notice. The other contains a clause that provides for termination for cause.

The dispute between the parties arises out of a complaint of misconduct against the respondent. Specific allegations were made. One of these was that the respondent had joined another insurance company. Another was that he had attempted to induce four other agents to leave the appellant and join another insurance company. The respondent replied through his former solicitors denying the allegations. He was nevertheless summarily dismissed. He filed action for breach of contract. The judge held his dismissal to be bad and awarded damages. This appeal is directed against that judgment.

The first point to be noticed is that the trial judge accepted the evidence of the defendant's witnesses who testified about the plaintiff's attempt to get them to leave the defendant's employment. He said so twice in his judgment. But

he nevertheless went on to hold that the defendant was obliged to give the plaintiff the two-week notice. Was he right in doing so? I do not think he was.

We are here concerned with the position at common law. It is materially different from industrial law. In industrial law, for example, a workman may obtain specific performance of his contract of employment through an order of reinstatement. But the common law and the ordinary rules of equity working in tandem do not provide such relief, save in the rarest of cases. See, *Francis v. Municipal Councillors of Kuala Lumpur* [1962] MLJ 407.

The common law governing the relationship of master and servant is clear. It is contained in the following propositions.

(1) A master is entitled to summarily dismiss his servant at any time, notwithstanding any contractual provision requiring the giving of notice of termination.

(2) If a dismissal is challenged, the burden is on the master to justify it: *SR Fox v. Ek Liong Hin Ltd* [1957] MLJ 1.

(3) If the master fails to justify the dismissal then he must pay the servant such damages as are just in *lieu* of proper notice.

(4) A master who has given no reason or a bad reason for summarily dismissing his servant may, at the trial of the action, justify the dismissal for a good reason. See, *Boston Deep Sea Fishing & Ice Co. v. Ansell* [1888] 39 Ch. D 339.

(5) But there may be circumstances in which a court may estop a master from relying on new grounds to sustain a dismissal made on invalid grounds. Here I think it sufficient to quote the example given by Lord Denning MR in *Panchaud Freres SA v. Establisement General Grain Co* [1970] 1 Lloyd's LR 53, 56:

> It is similar to the rule that if a man dismisses a servant on one ground, he is not confined to that ground. If he afterwards find another ground justifying his dismissal, he can rely on that too. But this rule is subject to the qualification that a man may by his conduct preclude himself from setting up the later ground. We had, a little while ago, a case where a man was dismissed for one particular piece of dishonesty. At the trial the employer realised that he would not succeed in proving that particular dishonesty. So, during an adjournment, he got evidence of another piece of dishonesty and tried to raise it. But we did not allow it. He had fought the case on the earlier ground, and it would not be fair to allow him to rake up another ground at that stage. It is not, strictly speaking, a case of waiver but of estoppel by conduct.

(6) An express contractual mechanism, in the absence of it forming a comprehensive code for termination, does not oust a party the common law right of repudiation. That was made clear by Lord Denning MR in *Wickman Machine Tool Sales Ltd. v. Schuler AG* [1972] 1 WLR 840, 852 in a judgment affirmed by the House of Lords on further appeal:

> Although clause 11(a) would appear to provide for the circumstances in which the agreement can be determined, I do not think it should be treated as a comprehensive code. Take a case where one party repudiates the contract and the other accepts it. That is not within clause 11(a). Take another case when one party commits a breach which was not capable of remedy, as if Wickman Sales disclosed important trade secrets to a rival. I do not think that Schuler would have to give a 60 day notice under clause 11(a). In short, if one party or the other was guilty of a breach which went to the root of the contract and was not capable of remedy, then the injured party could treat himself as discharged from further performance. But, if it is a breach which does not go to the root of the contract – and it is only a material breach which is capable of remedy – then clause 11(1)(a) does apply.

(7) At common law it is irrelevant that the master has not heard the servant in his defence before terminating his services. What is important is whether the proved or admitted facts disclose a breach of contract; for if they do, the master need not pay damages: *Menon v. Brooklands (Selangor) Rubber Co. Ltd.* [1968] 1 MLJ 15; [1968] 2 MLJ 186.

(8) A master is entitled to summarily dismiss his servant for misconduct. This is because misconduct goes to the root of the contract and generally has the effect of destroying the relationship of trust and mutual confidence that is essential in a master servant relationship: *Motilal v. Guthrie Agency (M) Ltd.* [1968] 1 MLJ 211; *Menon v. Brooklands (Selangor) Rubber Co. Ltd. (ibid)*.

Applying the foregoing propositions to the present instance, I am of the view that this is a case where the judge misdirected himself. Having satisfied himself that the plaintiff had attempted to induce four other agents to leave defendant he ought to have held that misconduct had been proved. Accordingly, he ought to have gone on to hold that the defendant was justified in summarily dismissing the plaintiff. If the judge needed authority, he would have found it in the judgment of Sellers LJ in *Sinclair v. Neighbour* [1966] 3 All ER 988, 989:

> This case turns on the attitude which the employer could properly take to that conduct. It seems that the employee not infrequently used to telephone to the employer. The employer said the employee did it too often, and so he did not think he would do it again over this matter. He took the money without asking. He thought that, if he had asked, the employer might have lent him the money for some purposes, but that if he had told him it was for betting the employer would not have agreed. He would not have permitted it. Whether such taking of the money would have resulted in a conviction for larceny or for dishonest misappropriation of the money does not arise, in my view. On these facts a jury might have taken the view that they would not convict; *but I do not think that it matters whether the conduct is to be described as dishonest misconduct or not.* Views might differ. *It was sufficient for the employer if he could, in all the circumstances, regard what the employee did as being something which was seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged.* (emphasis added.)

So too here. It does not matter a jot that the plaintiff did not himself join another insurance company. Suffice that he made attempts to get other fellow agents to leave. The effect of such conduct would be to undermine the business of the employer. It is a conduct that is seriously corrosive of the relationship of master and servant. It warranted the immediate termination of the contract of employment. To require a master in these circumstances to pay damages – as the judge ordered – is to add insult to serious injury.

We were repeatedly urged by the plaintiff's counsel during the course of argument that there ought to have been a proper disciplinary inquiry before the dismissal. In my view the short answer to that argument is that there is no such requirement at common law: *Menon v. Brooklands (Selangor) Rubber Co. Ltd. (supra)*.

Having given this matter my most anxious consideration, I am driven to the conclusion that this appeal must succeed. I would accordingly set aside the order of the learned judge and dismiss the plaintiff's suit. The costs here and in the court below must be borne by the plaintiff. The deposit in court is to be paid out to the defendant.

Before I conclude this judgment there is an observation I would make. It has to do with the conduct of the appellant's solicitors. Now, when the dispute between the parties first arose, the present solicitors for the defendant acted for the plaintiff. But they did not appear for anyone at the trial. Now they appear for the defendant in this appeal after having taken instructions from the plaintiff. Mr. Robert Lazar sought to defend what has been done by his firm. He said that the instant solicitors did not object to what has happened. I think that is irrelevant. Just because the plaintiff's present solicitors lacked the initiative to take the point does not mean that what was done was right.

It was plainly wrong. I said so during argument. The defendant's solicitors were privy to confidential information given to them by their erstwhile client, the plaintiff. The fact that they did not use that information against him by appearing against him at the trial is irrelevant. There are other obvious dangers such as having access to information from the client and using it at the appellate stage. If that is not an abuse of a solicitor's position, I really do not know what is. Since there is no complaint of a miscarriage of justice arising out of this conflict of interest, I am minded to say no more about this unfortunate state of affairs.

My learned brothers Denis Ong Jiew Fook and Mohd Noor Ahmad JJCA have read this judgment in draft and have expressed their agreement with it.